Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-73

STELLA YOUNG and RONNIE J. ENRIGHT,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL J. BROWN, P.C.
222 N. Court Avenue
Tucson, Arizona 85701
Counsel for Petitioners

OF COUNSEL:

ALEX A. GAYNES, P.C.
220 East Speedway
Tucson, Arizona 85705

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The petitioners, STELLA YOUNG and RONNIE J. ENRIGHT, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case, entered on March 31, 1976.

OPINION BELOW

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 31, 1976. A timely Petition for Rehearing was denied on June 18, 1976.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit is not yet reported but is appended hereto, infra, at page i.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

A. Does the deliberate destruction of evidence by the Government which is prejudicial to the defendants violate their right to due process of law, a fair trial and the effective assitance of counsel under the Fifth and Sixth Amendments to the United States Constitution?

B. Is it fundamental error to allow a conviction to stand when the marijuana introduced into evidence had no connection with this case?

C. It it a violation of petitioners' rights to due process as well as a violation of fundamental tenets of fair play to sustain their conviction when the fact that 99.998% of the evidence is destroyed prior to indictment is combined with the fact that the remaining portion of the seizure was apparently lost in the mail, necessitating the

introduction of marijuana into evidence which had no connection with the case at bar?

D. May a conviction for possession of a proscribed substance with the intent to distribute be sustained where there is no evidence that the defendants personally had actual or constructive possession of a proscribed substance?

E. Where agents of the Government have intentionally and wilfully destroyed relevant and material evidence was it reversible error to refuse to give the following instruction:

> "If you find that the plaintiff, the United States of America, has destroyed, caused to be destroyed, or allowed to be destroyed any evidence whose contents or

quality are in issue,
you may infer that the
true fact is against
their interest."

CONSTITUTIONAL AND STATUTORY PROVISIONS

Rule 16(a)(1)(C), Federal Rules of Criminal Procedure.

Constitutional Amendments V and VI, in haec verba. (See Appendix B).

STATEMENT OF FACTS

Petitioners were arrested by agents of the United States on August 27, 1974; they were subsequently indicted by a United States Grand Jury on January 23, 1975. Both petitioners were indicted for conspiracy in violation of 21 U.S.C. §§ 841 (a)(1), 952 (a) and 960 (a)(1) and 21 U.S.C. §§ 963 and 846, as well as unlawful possession of 1,033 pounds of marijuana for distribution in violation

of 21 U.S.C. §841 (a)(1).

Petitioner Young was also indicted for smuggling in violationg of 21 U.S.C. §§ 952 (a) and 960 (a)(1).

After the arrest, case agent Ken Sul and other officers of the Drug Enforcement Agency (hereinafter referred to as D.E.A.) allegedly brought seized material to Tucson. The matieral was allegedly weighed, (R.T. 171, l. 21; 190, l. 20-23; 216, 11, 13-14) on an uncalibrated scale. (R.T. 215, 11. 3-5). As each weighing was made, Mr. Sul recorded the amount on a piece of paper. (R.T. 215, 11. 17ff). After all the entries were made, Sul added the column of figures. (R.T. 216, 11. 3-4). However, when asked about the entries, Sul conveniently testified that he probably destroyed the paper containing the column of figures. (R.T. 216, 11. 1-2).

Apparently, though the record is unclear, Sul then placed the seized materials in the "seizure room" after the weighing process had been completed. (R.T. 170, 11. 21-22). There is no evidence in the record that the seized material was identified in any manner or physically segregated from other contents of that room. This is especially significant in light of the fact that 46,000 pounds of material went through the hands of the D.E.A. during the year in question. (R.T. 219, 11. 3-4). There was confusion as to when Sul allegedly extracted a "sample" (R.T. 190, 11. 3-4), whatever the date (R.T. 192, 11. 24-25), Sul allegedly weighed the "sample" on a different uncalibrated scale than had been used previously. (R.T. 208, 11. 5-8; 216, 11. 15-18).

Surprisingly, the Government never

introduced evidence that the "sample" taken by Sul was taken from the items seized in the camper.

Sul testified conflictingly that he mailed the "sample" to the Dallas Regional Laboratory of the D.E.A. on October 2, 1974, (R.T. 179, 11. 7-9), on October 3, 1974 (R.T. 179, 11. 15-18), and again at R.T. 189, 11. 11-17 on August 30, 1974 (R.T. 190, 11. 3-4).

The registry receipt number was 171338. (R.T. 220, 11. 5-8). Mr. Prall, the D.E.A. chemist, testified that the package he examined was received in Texas under the registry number 141712. (R.T. 275, 1. 25). The package examined by Mr. Prall appears to have arrived in Texas on the 9th of September 1974. (R.T. 276, 11. 8-9). Over objection, Mr. Prall stated that the package contained marijuana. (R.T. 282, 11. 23-24).

This testimony was admitted despite Mr. Prall's testimony that he first saw the package on December 16, 1974. (R.T. 275, ll. 1-3). No testimony as to the whereabouts of the package prior to analysis was elicited. While Mr. Prall's initials were imprinted on the package containing the marijuana (R.T. 277, ll. 20-24), it does not appear that Sul's initials were on any of the packages.

On about October 2, 1974, Agent Sul destroyed all of the "real " evidence, including all wrappers, weighing sheets, notes and bags, save a paltry 1,038 grams of a substance alleged to be marijuana. (R.T. 179, ll. 15-20). The destruction of the seized material occurred prior to indictment (R.T. 197, ll. 11-15) at a time when even Sul assumed that the defendants were represented by counsel. (R.T. 197, ll. 16-18). Yet, Agent Sul,

pursuant to what he first termed an agreement with the courts (R.T. 181, ll. 21-22) and later stated was an unwritten policy of the D.E.A. (R.T. 217, ll. 11-13), did not contact any of the defendants or their counsel to inform them that the seized material would be destroyed. (R.T. 198, ll. 1-4).

The true reason for Sul's destruction of the evidence is not clear. He received no specific orders to destroy this seizure. (R.T. 185, ll. 17-18). Nor did the D.E.A. "policy" result in Sul's ever receiving written authority to destroy marijuana. (R.T. 203, ll. 10-13). So far as Mr. Sul knew, the policy had been formulated by Special Agent in charge of the Tucson Office, a Mr. John Zienter. (R.T. 213, ll. 14-17).

REASONS TO GRANT WRIT

This court should grant the writ in the instant case because:

A. The Court of Appeals, Ninth Circuit, has rendered a decision in conflict with the decisions of other courts of appeal on the same matter;

B. The Court of Appeals, Ninth Circuit, has decided a federal question in a manner in conflict with the decisions of this court.

C. The Court of Appeals, Ninth Circuit, has decided important questions of federal law which have not been, but should be settled by this court.

Conflict in Circuits:

The holding, inter alia, of the Court of Appeals, Ninth Circuit, in the instant action, was that:

"There is nothing in

the record to indicate that the destruction of the bulk of the seized marijuana was done in bad faith. We also fail to see how either of the appellants was prejudiced by the failure of the Government to produce the full seizure."

The Court held that absent a showing of bad faith, the Government may intentionally destroy relevant and material evidence without sanction unless the defendant can also show that the destruction prejudiced him.

This holding is inconsistent with decisions in the Court of Appeals, District of Columbia Circuit, and the Second Circuit. Specifically, it is

inconsistent with the tests articulated in United States v. Miranda, 526 F.2d 1319 (2nd Cir. 1975), U.S. App. pendg. Docket 75-1590 (cert. filed 4/30/76) and United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971), aff'd after remand 448 F.2d 1182 (D.C. Cir. 1971). See also, Ross v. State of Texas, 474 F.2d 1150 (5th Cir. 1973); cert. den. 414 U.S. 850, 94 S.Ct. 141, 38 L.Ed 2d 98 (1973).

Summarizing several of the decisions of the circuits on this point, the Second Circuit stated:

> "(o)ther circuits have dealt with the loss of disclosable evidence by the government on a case-by-case basis, and have refused to impose sanctions where the loss was

> inadvertant and not deliberate or in bad faith, and there was not such prejudice to the defendant as to deny him a fair trial."(citations omitted).

United States v. Miranda, supra, 526 F.2d at 1327.

In the instant case, the loss was deliberate and not inadvertant. The prejudice to the defendant might have been obviated if the sample of marijuana introduced into evidence had been from the material seized. The prejudice to the defendant was the result of the destruction and loss of all the seized materials and the introduction of evidence which did not relate to this case.

Contrary to decisions of this court:

In United States v. Augenblick, 393

U.S. 348, 89 S.Ct. 528, 21 L.Ed 2d 537 (1969) this court indicated that sanctions should not be imposed where the loss was in good faith and earnest efforts had been made to find the evidence once its loss was discovered. See United States v. Miranda, supra, 526 F.2d at 1327. The converse of that rule is equally good law.

In Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed. 2d 706 (1972) this court interpreted the heart of the holding in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed 2d 215 (1963) to be the:

> "...prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is

material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence. 408 U.S. at 795-96, 92 S.Ct. at 2568.

In the instant case, the material was destroyed not more than five days after the indictment. To require a request by the defense to trigger Brady rights under these circumstances would be to authorize the quick and surreptitious destruction of evidence which would not be authorized to be destroyed openly.

Issues to be settled by this court:

The circuits are divided as to the meaning of "bad faith suppression" which warrants the imposition of sanctions. In the instant case, the Court of Appeals has held that the intentional and wilfull destruction of the bulk of the seized material (even when conjoined with the unexplained loss of the remainder) was insufficient to warrant a finding of bad faith. It remains for this court to determine what showing must be made by the defendants in order that the imposition of sanctions would be proper.

The second issue that needs to be resolved by this court is what showing must be made by the defendant to show that the suppressed material would have had a favorable character, within the meaning of Moore v. Illinois, for the defense when that material has been

destroyed by the Government and is unavailable for inspection.

The third issue in need of resolution by this court is whether the denial of the defendant's requested instruction, under the totality of circumstances of the case, constituted prejudicial and reversible error.

The post-arrest conduct of the Government in the instant action presents an almost classic study of the rationale for having the "chain-of-custody rule" and the rule which has developed in the light of Brady v. Maryland that the intentional suppression of evidence the Government will warrant the imposition of sactions. The record is devoid of any evidence that the "sample" Mr. Sul sent to Texas came from the camper. But that is a small matter when compared to the Government's introduction into

evidence of marijuana which could not have come from the camper. Having destroyed all the seized material the defendant couldn't even check the "sample" against the seized material. How convenient. How unjust.

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit in the instant action.

Respectfully submitted this 16 day of July, 1976.

Michael J. Brown
MICHAEL J. BROWN, P.C.
222 North Court Avenue
Tucson, Arizona 85701

Counsel for Petitioners

Of Counsel:

Alex A. Gaynes
ALEX A. GAYNES, P.C.
220 East Speedway Boulevard
Tucson, Arizona 85705

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, vs. STELLA YOUNG, Appellant.	No. 75-2044
UNITED STATES OF AMERICA, Appellee, vs. RONNIE J. ENRIGHT, Appellant.	No. 75-2040

OPINION

(March 31, 1976)

Appeal from the United States District Court for the District of Arizona

Before: ELY and WALLACE, Circuit Judges,
and SHARP,* District Judge

SHARP, District Judge:

Young appeals from concurrent sentences received upon conviction on each of three counts of an indictment: Count I, conspiracy; Count II, importation of a controlled substance; Count III, possession with intent to distribute the controlled substance. Enright appeals from concurrent sentences after convictions were entered on Counts I and III. Special parole terms were consecutive.

In these appeals, there are two main issues. The first is whether the

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*Honorable Morell E. Sharp, United States District Judge, for the Western District of Washington, sitting by designation.

seizure of approximately 1,033 pounds of marijuana from a truck after a stop on a highway was made with probable cause. Appellants argue that probable cause could not have existed because there was a break in the surveillance of an airplane suspected of flying the marijuana out of Mexico and into the United States. The second issue is whether the destruction of the seizure by the DEA approximately two months after the seizure without a court order or notice to counsel denied these appellants a fair trial.

We affirm.

The important facts are not in substantial dispute. In the afternoon of August 26, 1974, special agent Kenneth Sul of the Tucson office of the DEA received a tip that some persons operating an aircraft at Freeway Airport in Tucson

were acting suspiciously. When agent Sul arrived at the airport, the plane was not there. The next afternoon special agent Herbert Reay received information that the same plane and persons were again at Freeway Airport. Reay spoke with agent Sul and then proceeded to the airport with special agent George Corley. Sul arrived at the airport a short time later. They observed three men loading what appeared to be gasoline cans into a one-engine red and white aircraft with underslung wings. A fourth person, Stella Young, was in a nearby Javelin automobile. Two of the men, Ronnie Enright and Andrew Thomas, came to the auto and conversed with Young. She then got into the aircraft with Thomas and they took off around 5:15 p.m. Enright left the airport in the Javelin. The third male was not identified.

Customs agent Howard Farrington, a pilot, was requested to follow the red and white aircraft from the air. He identified the suspect airplane as a Piper Cherokee. Farrington and the agents on the ground maintained two-way radio communication thereafter.

Enright drove to a private residence. The surveilling agents drove past the residence, where they saw an empty pickup truck with a camper shell near the Javelin. Around 7:00 p.m. three persons left the house and drove away--Enright in the Javelin and John Heffernan and Kurt Rost in the pickup. They were followed at a distance by agents Sul, Reay and Corley to a road leading to an abandoned military airstrip near Picacho, Arizona. The DEA agents then requested and received assistance from the county sheriff's

office and the state patrol.

Agent Farrington observed the Piper Cherokee become airborne and followed it into Mexico. At the time the suspect aircraft crossed the border, it was flying at an altitude of no more than two hundred feet. It landed approximately sixty miles south of the border, near Altar, Mexico. Agent Farrington was able to observe his quarry from an altitude of nine thousand feet. From there he saw a truck come to the aircraft. The plane remained on the ground for approximately thirty-five minutes and then took off. It proceeded north toward the border, flying at a very low altitude, sometimes no more than fifty feet off the ground. The plane crossed the border at approximately 7:40 p.m. without asking for or receiving the required Customs clearing.

It also operated without any running lights, although darkness was near. A few miles north of the border Farrington lost sight of the airplane because of darkness. He requested assistance from another Customs pilot, Warren Parthen.

Parthen piloted a plane equipped with an infrared sensing device operated by his passenger, Gerald Young. They proceeded to the Picacho airstrip and arrived at 7:45 p.m. Farrington arrived there a little after 8:00 p.m. Around 8:10 p.m. Young detected a Piper Cherokee aircraft approach the landing strip. Although he was able to view the aircraft in darkness with the aid of the infrared sensing device, he was not able to read the airplane's identification number. The suspect airplane landed with the aid of the headlights from the Javelin and

pickup, located at opposite ends of the runway. It remained on the ground for about seven minutes and then took off. Agent Young then observed the Javelin and pickup approach each other and then head toward the Picacho Road beyond the airstrip with the pickup truck in the lead. The agents on the ground could not see this activity. Agent Reay, who was closest to the airstrip, was able to see the lights of the two vehicles a few moments later. The other DEA agents and local officers were gathered near the intersection of Picacho Road and Interstate 10. At the direction of special agent Sul they decided how the two suspect vehicles would be stopped.

A Pinal County Deputy Sheriff, Kenneth Thompson, stopped the pickup truck on Interstate 10 shortly after it

entered the highway from the entrance ramp. Special agents McBride and Caton pulled in front of the truck and left their car. Agent McBride, with his gun drawn, went to the passenger side of the pickup and told John Heffernan to leave it. Agent Caton went to the driver side and had Kurt Rost leave the truck and go over to the passenger side. There they were both told to lean against the truck, spread their legs and were frisked. As this was occurring, Deputy Sheriff Thompson arrived to assist the two DEA agents. His gun was drawn and he covered the DEA agents and the suspects. Heffernan and Rost were then placed in McBride's automobile.

By this time, Sul and Corley had stopped the Javelin about a quarter mile behind the pickup. Ronnie Enright and

his passenger, Stella Young, were told to leave the automobile and Enright was patted down. Special agent Reay, along with a sheriff's deputy and state patrolman, were also on hand. Reay covered the suspects when Sul and Corley left to go to the pickup. Enright and Young were not told they were under arrest. Apparently, Sul wanted to search the camper first.

Because the headlights from Thompson's car illuminated the rear of the pickup, Sul could see through the uncovered rear window of the camper shell a number of bags with Mexican writing on them. He, McBride and Caton then smelled around the perimeter of the rear entry and detected the odor of marijuana. Sul then entered the vehicle and searched it. Agent Reay was then instructed to arrest

Enright and Young.

Prior to trial the district judge denied defense motions to suppress the evidence of the seizure. He found the search valid for either of two reasons: That the stop of the two vehicles was based upon probable cause due to the furtive activities of the Piper Cherokee and the ground vehicles or that the stop of the pickup was made on a founded suspicion and that probable cause existed after the agents saw the bundles in the rear in plain view. The district judge questioned whether Enright and Young had standing to challenge the search made of the vehicle operated by Heffernan and Rost. He did not resolve this issue.

I.

At this outset, we find that Young and Enright each have standing to

challenge the search as to Counts I and III. An element of each of those crimes charged is that appellants actually or constructively possessed the marijuana. Young does not have standing with respect to the importation count since possession was not an element of that offense. See Jones v. United States, 362 U.S. 257 (1960); Brown v. United States, 411 U.S. 223 (1973); United States v. Boston, 510 F.2d 35 (9th Cir. 1974).

We hold that probable cause existed to arrest all four individuals at the time the camper was stopped on Interstate 10. The surveillance of the Piper Cherokee aircraft into and out of Mexico indicated that a crime was being committed. The reasons for this were stated by the district judge at the conclusion of the suppression hearing. Briefly, the signi-

ficant facts were the altitude of the airplane when it left and re-entered the United States, the rendezvous with a truck in Mexico, the return into the United States without running lights and the failure to ask for required clearance. In addition, the officers on the ground followed two vehicles to the airstrip, one of them capable of carrying a heavy and bulky load. Agents Farrington, Parthen and Young, in the air, could see those vehicles use their headlights to aid the aircraft in landing. Agent Young determined that the airplane was a Piper Cherokee, the same type that took off from Freeway Airport earlier that day.

These facts, whether observed in the air or on the ground, were relayed to the other agents. Considered together,

they add up to provide a reasonable belief that criminal activity was under way.

Appellants argue that probable cause never developed because the agents could not be certain that the plane which landed at Picacho was the same one observed by agent Farrington. This argument is without merit. To say otherwise would require us to ignore the facts presented in the record. Those facts and the reasonable inferences which may be drawn from them lead us to believe that the people in the pickup and the Javelin were awaiting the same aircraft which took off from Freeway Airport.

The fact that agent Farrington arrived over the Picacho airstrip in his plane ten to fifteen minutes before the suspect plane arrived does not trouble us. Testimony at trial and in the

hearing on the motion to suppress indicated that the Piper Cherokee had a considerably slower airspeed than the Beechcraft Duke flown by agent Farrington.

II.

There is nothing in the record to indicate that the destruction of the bulk of the seized marijuana was done in bad faith. We also fail to see how either of the appellants was prejudiced by the failure of the Government to produce the full seizure. Photographs were made of the seizure and samples were taken and preserved through the trial. The jury was properly instructed that it could infer the appellants intended to distribute the marijuana if it found that a large quantity was involved. It was also instructed that it alone was to determine whether the entire seizure was, in fact,

marijuana. The jury found against appellants on these questions and we cannot say that the evidence and testimony did not support those findings. This being so, we cannot say that the destruction of the evidence merits reversal or a new trial. However, in affirming this conviction, we do not wish to imply that we approve of the procedure followed by the DEA in its destruction of the evidence. We again suggest that the Government adopt a better procedure for disposing of large seizures of drugs. See United States v. Heiden, 508 F.2d 898, 903 (9th Cir. 1974) (concurring opinion).

III.

We believe that the jury could properly find that appellant Enright had constructive possession of the marijuana, that the chain of custody was not broken

and that a conspiracy existed.

AFFIRMED.

ELY, Circuit Judge (Concurring):

I concur in the result, and I have no significant quarrel with the majority's reasoning. Nevertheless, I deem it important to mention that I see no relevance in the majority's discussion of the break in the surveillance of the airplane. We have issued many opinions holding that a significant break in the surveillance of a vehicle after the vehicle has been seen to enter this country prohibits a subsequent search of the vehicle on the theory that the search is an extended "border search." I am actually at a loss, however, in perceiving wherein the fact that observing officers have lost sight of a vehicle that has crossed

the border can possibly be a factor in determining the existence, vel non, of probable cause for a challenged search. I might be able to discern some relevance if, as was not the case here, the break in surveillance had obviously resulted from evasive maneuvering by the operator of the machine at which the attempted continuous observation was directed.

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Rule 16(a), Federal Rules of Criminal Procedure

(1)(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

2. Amendment V to the United States Constitution

No person shall be held to answer for

a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

3. Amendment VI to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district

shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX C

If you find that the plaintiff, the United States of America, has destroyed, caused to be destroyed, or allowed to be destroyed any evidence whose contents or quality are in issue, you may infer that the true fact is against their interest.

AUTHORITY: 2 Wigmore Evidence §285 (3rd Ed. 1940);

State v. Willits, 96 Ariz. 184, 393 P.2d 294 (1964).

APPROVED:_____

GIVEN AS MODIFIED:____

REJECTED:_____

WITHDRAWN:_____

_____
United States District
Court Judge

CERTIFICATE OF SERVICE

Counsel for the petitioners avow that they deposited in the United States Post Office in Tucson, Arizona, with first class postage prepaid, three (3) copies each of petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, to:

William C. Smitherman
United States District
Attorney
District of Arizona
Post Office Box 1951
Tucson, Arizona 85702
Counsel of record for
United States of America

and

Solicitor General
Department of Justice
Washington, D. C. 20530

DATED this 16th day of July, 1976.

MICHAEL J. BROWN